Sustainable Development in World Investment Law
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1. STREAMS OF PUBLIC INTERNATIONAL LAW

Within the broader field of public international law, there are many subfields, including those of international environmental law and international economic law. Because public international law often emerges through regional legal developments and because public international law is not subject to the discipline of a single global legal entity, its evolution often lacks coherence.\(^1\) Different regions develop different legal principles and institutions to govern their international

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affairs, and particular subfields of public international law can develop their own independent trajectories that take little account of the inconsistencies that may exist with other subfields.

In terms of international environmental law and international economic law, we are now confronted with a somewhat turbulent confluence between public international law on cross-border freshwater resources (cross-border water law) and public international law on foreign investment (foreign investment law). Globally, these two streams of public international law are intersecting with increasing frequency, giving rise to uncertainty. The essence of this uncertainty hinges on the extent to which water allocation provisions in cross-border water treaties may establish rights enforceable against nation States pursuant to foreign investment treaties, and the extent to which standing requirements and dispute resolution mechanisms under cross-border water treaties may differ from those established under foreign investment treaties.

In Africa, for instance, claims regarding the Nile River were allocated pursuant to the 1959 Agreement for the Full Utilization of the Nile Waters (1959 Nile Agreement). Pursuant to the 1959 Nile Agreement, Egypt was allocated 55 billion cubic meters (annually) of the main Nile, Sudan was allocated 18.5 billion cubic meters (annually), and upstream nations such as Ethiopia were implicitly prohibited from diversions that threatened Egypt’s or Sudan’s numerical allocations. According to water researchers, Ethiopia’s headwaters and snowpack contribute the majority of the water that feeds the main Nile, but Ethiopia presently utilizes less than 1% of the Nile Basin’s waters. To meet crop irrigation and drinking water needs, Ethiopia has recently proposed plans to divert additional waters from highland Nile tributaries – plans that could potentially affect water supplies downstream in Sudan and Egypt and thus give rise to potential claims of non-compliance with the 1959 Nile Agreement.

In 2000, however, the Agreement Between the Government of the Federal Republic of Ethiopia and the Government of the Republic of Sudan on the Reciprocal Promotion and Protection of Investment (2000 Ethiopia–Sudan Investment Treaty) was signed. The 2000 Ethiopia–Sudan Investment Treaty defines ‘investment’ to include ‘concessions to search for, cultivate, extract or exploit natural resources’ (italics added) and provides that ‘prompt, adequate and effective compensation’ may be due if one nation takes ‘any measures of expropriation, nationalization or any other measures having the same nature or the
same effect against investment of Investors of the other Contracting Party’. Under the 2000 Ethiopia–Sudan Investment Treaty, disputes are to be resolved (depending on the parties’ discretion) through either submission to a three-person Arbitral Tribunal or to the International Centre for Settlement of Investment Disputes (ICSID), both of which are empowered to issue ‘final and binding’ awards.

The central question here is whether parties may bring claims against Ethiopia pursuant to the 2000 Ethiopia–Sudan Investment Treaty to the extent that Ethiopian upstream diversions diminish the downstream waters available such that Sudan’s freshwater allocation under the 1959 Nile Agreement is impaired.

In South America, as another, separate example, Ecuador and Peru entered into a treaty in 1998 to allocate the waters of the cross-border Zarumilla River and Canal. The 1998 Agreement on the Basis for the Administration of the Zarumilla/Rules for the Administration of the Zarumilla Feed and Utilization of Water (1998 Zarumilla Agreement) built on a previous water-sharing agreement negotiated between Ecuador and Peru in 1944 that obligated Peru to ‘guarantee the supply of water necessary for the life of the Ecuadorian villages’ on the right bank of the river. There were longstanding allegations by Ecuador of Peruvian non-compliance with its water supply obligations under the 1944 water-sharing agreement. Pursuant to the 1998 Zarumilla Agreement, Ecuador was allocated rights to 55% of the water in the flow channel and Peru was allocated 45%. Disputes over compliance with this freshwater allocation regime are to be referred to a Permanent Binational Commission composed of Ecuadorian and Peruvian sections.

One year later, however, in 1999, Ecuador and Peru entered into a bilateral investment treaty. The Treaty Between the Government of the Republic of Peru and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments (1999 Ecuador–Peru Investment Treaty) defines ‘investment’ to include ‘concessions for the prospecting, exploration and exploitation of natural resources’ (italics added) and provides that ‘rapid adequate and effective compensation’ may be due if one nation takes an action that ‘has the

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7. Ibid., Art. 1(a)(v) and Art. 4(c) [emphasis added].
8. Ibid., Art. 8 and Art. 9.
10. Declaration and Exchange of Notes Concerning the Termination of the Process of Demarcation of the Peruvian-Ecuadorian Frontier, Peru and Ecuador, 22 May 1944. The terms for allocation were subject to the Aranha Formula which further clarified that Peru would ensure sufficient water ‘in order to provide Ecuadorian villages situated along its banks with the aid essential to their existence’.
12. 1998 Zarumilla Agreement, supra n. 9, Cl. 15, Art. 37, and Art. 38.
equivalent effect of expropriation or nationalization’ of the investments of the citizens of the other nation.\textsuperscript{14} Under the 1999 Ecuador–Peru Investment Treaty, a complaining party can seek ‘final and binding arbitration’ against the alleged offending nation before the ICSID.\textsuperscript{15}

Could the water allocations under the 1998 Zarumilla Agreement provide the basis for a claim under the 1999 Ecuador–Peru Investment Treaty in connection with alleged improper river diversions? Again, this is a central question to the overall purpose of this chapter.

In North America, this confluence of subfields of public international law is no longer theoretical, but instead was directly at issue in an acute conflict that recently played out between the United Mexican States (Mexico) and private water users from the State of Texas in the United States of America (United States). This dispute centred on claims to the cross-border waters of the Rio Grande under the terms of the 1944 Rivers Treaty between Mexico and the US and the investor protection provisions of the 1994 North American Free Trade Agreement (NAFTA) among Mexico, and the United States, and Canada.\textsuperscript{16} In July 2007, an international arbitral tribunal – the ICSID, the same dispute resolution body designated in the 2000 Ethiopia–Sudan Investment Treaty and the 1999 Ecuador–Peru Investment Treaty – issued its decision in the Rio Grande case. This decision represents perhaps the most significant consideration of the legal relationship between cross-border water law and foreign investment law to date.

This chapter deconstructs the arguments ultimately accepted (and rejected) by the July 2007 ICSID tribunal for the Rio Grande dispute, with an eye toward what the Rio Grande case may signal for similar public international law conflicts emerging in other regions over competing claims to cross-border freshwater resources.

2. RI O GRANDE CASE IN NORTH AMERICA

2.1. R IO GRANDE A LLOCATION R EGIME UNDER THE 1944 R IVERS TREATY

The Rio Grande River Basin is 180,000 square miles, runs from Colorado to the Gulf of Mexico, and forms more than 1,200 miles of the border between Mexico and the United States.\textsuperscript{17} In 1944, the US and Mexico entered into a treaty to

\textsuperscript{14} Treaty Between the Government of the Republic of Peru and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments, 7 Apr. 1999 (1999 Ecuador-Peru Investment Treaty) (entered into April 1999). The original version of treaty is in Spanish translated into English by co-author Jonathan Schutz for purposes of this article. Copy on file with authors. Art. 1 and Art. 4 [emphasis added].

\textsuperscript{15} Ibid., Art. 8.


\textsuperscript{17} Mary E. Kelly, ‘Water Management in the Binational Texas/Mexico Rio Grande Rio Bravo Basin’, in Human Population and Freshwater Resources: U.S. Cases and International
allocate the waters of the Rio Grande, entitled the Treaty Relating to the Utilization of Colorado and Tijuana Rivers and of the Rio Grande (1944 Rivers Treaty). The Rio Conchos, (with its headwaters in Mexico) is the largest Rio Grande tributary, draining 26,400 square miles and contributing 35%–40% of the Rio Grande’s flows from the point of confluence. The Rio Grande is mostly dry where it becomes the bi-national border until the Rio Conchos enters the Rio Grande stem at the city of Presidio in the State of Texas. Sixty-five years after its adoption, the 1944 Rivers Treaty remains the primary governing document on US and Mexican respective rights and obligations regarding such cross-border waters, and establishes the bilateral International Boundary and Water Commission (‘IBWC’) as the competent forum to resolve disputes over the agreement’s water allocation terms.

In terms of the Rio Grande, the 1944 Rivers Treaty allocated one third of the water flow reaching the Rio Grande from the Rio Conchos to the US, as well as several smaller streams that flow from Mexico to the Texas border. This third is to be no less than 350,000 acre-feet (AF) annually, averaged over a five-year period. The five-year cycle in question is considered to be terminated, all debts are deemed to have been paid in full, and a new five-year cycle begins ‘whenever the conservation capacities assigned to the United States in at least two of the major international reservoirs, including the highest major reservoir, are filled with water belonging to the United States’.

The 1944 Rivers Treaty provides an exception to Mexico’s prescribed obligations regarding Rio Grande deliveries in times of ‘extraordinary drought’. The agreement provides that in times of ‘extraordinary drought’ that make ‘it difficult for Mexico to make available the run-off of 350,000 acre-feet annually…any deficiencies existing at the end of the…five-year cycle shall be made up in the following five year cycle’. The 1944 Rivers Treaty, however, does not define the circumstances that constitute ‘extraordinary drought’. Furthermore, it is unclear whether (in times of drought) Mexico is entitled to hold enough water

Perspectives, ed. Karin M. Krchnak (Yale School of Forestry and Environmental Studies Bulletin 107, 2002), at 115, [Kelly].
20. 1944 Rivers Treaty, supra n. 18.
21. Ibid., at 1226–1227.
22. Ibid., at 1227–1228.
23. Ibid.
24. Ibid., at 1227. There are similar provisions for when the US is unable to deliver water from the Colorado River to Mexico, ibid., at 1237–1238.
25. Primer, supra n. 19, at 5.
in its reservoirs to meet its own water demands before it must release water into the 
Rio Grande to pay back a water deficit, as long as it delivers the required amounts 
at some point within a subsequent five-year cycle.26

The initial five-year cycle began in 1953 and ended in 1958.27 This cycle 
ended with a Mexican deficit of 476,461 AF.28 However, in the next five-year 
cycle (1958–1963), Mexico delivered more than the required delivery amount, 
which ‘was more than enough to cover the water delivery deficit’ from the previous 
five-year period.29 In the third five-year period (1963–1968), Mexico delivered 
32,270 AF in excess of the 1,750,00 five-year obligation of 175,000 AF.30 
Thereafter, until 1992, Mexico did not incur a deficit in any five-year period.31 
Therefore, from 1953 to 1992, Mexico met its delivery obligations in all but one 
five-year cycle, which coincided with the severe drought experienced during was 
the late 1940s and early 1950s.32 The annual inflow received by the US during 
between 1953 and 2001 was about 405,000 AF.33

The 1992–1997 cycle ended with a Mexican deficit of 1,023,849 AF.34 Rely-
ning on the drought provisions of the 1944 Rivers Treaty, Mexico carried this 
debt over to be repaid in the 1997–2002 cycle. In 2001, Mexico had reduced 
its 1992–1997 deficit to 0.69 million AF (MAF).35 However, at the end of the 
1997–2002 cycle, Mexico’s deficit had grown to 1.3 MAF.36

Mexico claimed that drought conditions prevented it from delivering the 
amounts of Rio Grande water required under the 1944 Rivers Treaty.37 There are 
conflicting claims as to whether Mexico’s reduced delivery of Rio Grande water

28. Ibid.
29. Ibid., at 2–3; The debt from the 1953–1958 period was 476,461 AF and Mexico delivered 548,184 AF in surplus water in the 1958–1963 period (Deliveries of Waters Allotted, supra n. 27, at 7); International Boundary and Water Commission, Update of the Hydrologic, Climatologic, Storage and Runoff Data for the United States in the Mexican Portion of the Rio Grande Basin: October 1992–September 2001 (April 2002), at 3 [IBWC Update].
30. Deliveries of Waters Allotted, supra n. 27, at 3.
31. IBWC Update, supra, n. 29, at 2–3.
32. Legal and Institutional Framework, supra n. 26, at 24; Kelly, supra n. 17, at 107, 115, 139; see also Rio Conchos Report, supra n. 19, at 24.
33. IBWC Update, supra n. 29, at 3.
34. Ibid.; Deliveries of Waters Allotted, supra n. 27, at 4; Rio Conchos Report, supra n. 19, at 24.
was due entirely to hydrological drought considerations, or whether such reductions were also due in part to increasing demands for Rio Grande tributary water by Mexican farmers and cities, was central to the dispute in Mexico.38 A number of indicators bolstered the former contention. The average rainfall for the Rio Conchos Basin between 1995 and 1999 was the lowest it had been since the late 1940s and the early 1950s.39 The Lower Rio Grande Valley was in ‘extreme’ drought according to many sources.40 All of the Mexican States in the Lower Rio Grande Valley were declared disaster areas during various parts of this period.41 Reservoirs in Mexico reached the lowest levels since their construction.42 Irrigation districts in the Rio Conchos basin, generally, used significantly less than their historical averages and planted significantly less acreage.43 Crop losses in Mexico in 1994–1995 were estimated at a combined 600,000 acres of sorghum, corn, bean, and wheat, though there is little information on economic losses; Texas citrus sugar cane, and vegetable growers in the lower Rio Grande region also suffered crop losses.44 Farmers in both Mexico and Texas suffered from the lack of rainfall.45 Mexico’s invocation of its drought rights in the 1992–1997 cycle and the 1997–2002 cycles led to consultations between Mexico and the US at the Boundary and Water Commission (IBWC) to resolve how and when Mexico would pay back the water debt it had accumulated. In 2003, an understanding was reached between

38. The IBWC Update after stating that ‘Below-average rainfall conditions occurred in each of the tributary watersheds during several of the years since 1993’, concludes that rainfall in the Rio Grande tributaries during the 1993–1999 period was ‘not appreciably below normal’ (supra n. 29, at 7). The same report also states that rainfall in the Rio Conchos Basin, the major Rio Grande tributary, was about 55% of normal rainfall levels in 1994 and about 70% of normal levels in 1995, while relatively equivalent to normal levels in 1993, 1996, and 1997 (ibid., at Figure 11).

39. Kelly, supra n. 17, at 107, 115, 126 (Figure 4), 139; Rio Conchos Report, supra n. 19, at 24–25 (Figure 5); Legal and Institutional Framework, supra n. 26, at 24.

40. Primer, supra n. 19, at 2.

41. Ibid.

42. Rio Conchos Report, supra n. 19, at 7–8; The Rio Conchos Basin reservoirs were at 21%–26% of capacity, and those of the Saldado Basin, tributaries to the Rio Conchos, were at 10%–11% (Deliveries of Water Allotted, supra n. 27, at 4); Primer, supra n. 19, at 4.

43. Rio Conchos Report, supra, n. 19, at 8. For example, the Rio Florido Irrigation District used 151 mm3 of water in 1993–1994 and 36.2 in 1994–1995. In the same time period, the Bajo Rio Conchos Irrigation District was the only district in which water use increased, rising only slightly from 109 to 145 mm3 (ibid., at 13 [Table 6]). However, groundwater use increased in this time period, illustrating the source of the increase was not necessarily surface water (Primer, supra n. 19, at 8). The Delicias Irrigation District went from 1390 to 134 (Rio Conchos Report, supra n. 19, at 13 [Table 6]). For the period of 1993–2000, irrigation decreased by 31% in the Delicias District (Primer, supra n. 19, at 8). The number of acres planted followed a similar pattern: the Rio Florido district went from 8331 hectares to 2118, the Delicias District from 79,796 to 11,187, and the Bajo Rio Conchos from 4,444 to 5,513 (Rio Conchos Report, supra n. 19, at 13 [Table 6]).

44. Kelly, supra n. 17, at 107, 115; Primer, supra n. 19, at 10.

45. Primer, supra n. 19, at 11.
} With the IBWC’s assistance, Mexico and the US continued to work to eliminate the debt, and on 10 March 2005, the IBWC announced that ‘The United States and Mexico will consider that Mexico’s water debt is completely eliminated’\footnote{Ibid.} Mexico met its delivery obligations for the first two years of the current cycle.\footnote{Fact Sheet, supra n. 36.}

2.2. FOREIGN INVESTMENT TERMS UNDER THE 1994 NAFTA


2.2.1. 1993 NAFTA Statement on Water

The bulk of NAFTA’s provisions focus on transnational trade in goods and products. Early on, however, the NAFTA Parties recognized that water did not fit neatly within accepted notions of what constituted a good or product under traditional trade and investment law terminology. This recognition led the NAFTA signatories to issue a joint statement in 1993 concerning NAFTA’s application to water resources (1993 NAFTA Statement on Water).\footnote{1993 Joint Statement of Governments of Canada, Mexico and the United States, online: <www.scics.gc.ca/cinfo99/83067000_e.html#statement>.
} The 1993 NAFTA Statement on Water provides:

> The governments of Canada, the United States and Mexico, in order to correct false interpretations, have agreed to state the following jointly and publicly as Parties to . . . NAFTA:
> The NAFTA creates no rights to the natural resources of any Party to the Agreement.
Unless water, in any form, has entered into commerce and become a good or product, it is not covered by the provisions of any trade agreement including the NAFTA. Water in its natural state in lakes, rivers, reservoirs, aquifers, water basins and the like is not a good or product, is not traded and therefore is not and never has been subject to the terms of any trade agreement.

International rights and obligations respecting water in its natural state are contained in separate treaties and agreements negotiated for that purposes. Examples are... the 1944 Waters Treaty between Mexico and the United States.51

Phrasing such as ‘entered into commerce’ and ‘in its natural state’ were not further defined, leaving room for divergent interpretations. Even with these ambiguities, however, the 1993 NAFTA Statement on Water suggests a recognition by the NAFTA parties that there is something different about water as compared to other items that may cross national boundaries – something that falls outside traditional notions of what constitutes a good or product for the purposes of foreign trade and investment regulation.

2.2.2. NAFTA Chapter 11 Definitions of Investment and Investor

NAFTA Chapter 11’s use of the term ‘investment’ instead of the terms ‘good’ or ‘product’ makes for a confusing application to water resources. Although the 1993 NAFTA Statement on Water provides that water generally should not be considered a ‘good or product’ for NAFTA purposes, it does not directly address the question of how this characterization might affect claims regarding an investment in water brought pursuant to Chapter 11. More specifically, the 1993 NAFTA Statement on Water leaves open the possibility of claims regarding ‘investments’ in water that might be independent of claims that water itself is a good or product.

Article 1139 of NAFTA attempts to offer some guidance on what might be considered an investment for Chapter 11 purposes. Article 1139(g) provides that the term ‘investment’ may include ‘real estate or other property acquired in the expectation or used for the purposes of economic benefit’.52 Yet, the definition provided in Article 1139(g) is of limited assistance in that it merely raises the underlying question of whether, and if so to what extent, a private party can ‘acquire’ a property interest in water.

Article 1139(h) of NAFTA similarly attempts to offer guidance by providing that an investment may include ‘interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory’.53 As discussed below, the focus on the ‘territorial’ aspects of investments in this provision may be pertinent in the cross-border waters context, but as with the use of
the term ‘acquired’ in Article 1139(g), the use of the term ‘interests’ in this context simply raises the question of what ‘interests’ private parties may or do hold in the right to divert and use freshwater resources.

Chapter 11’s definition of ‘investor’ in Article 1139 also provides limited guidance. This definition provides that an ‘investor of a Party’ means a Party ‘that seeks to make, is making or has made an investment’. As to what constitutes an investment for the purposes of determining who constitutes an investor in the context of Chapter 11 claims involving water resources, we are again left with the uncertainties of Article 1139’s definition of investment.

2.2.3. Dispute Settlement Mechanisms

To settle Chapter 11 disputes, Chapter 11 allows a private investor to initiate arbitration directly against the offending party. The party submitting the claim to arbitration may elect among three sets of governing rules for the arbitration: (a) the ICSID Convention,54 (b) the Additional Facility Rules of the ICSID, or (c) the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.55 The results of Chapter 11 arbitration proceedings are binding and no procedure for appeal or review is specifically provided.56

2.3. Texans’ NAFTA Claim for Undelivered Rio Grande Water

The Texans submitted their notice of intent to seek arbitration under NAFTA Chapter 11 on 27 August 2004, and also submitted a request for arbitration to the ICSID on 19 January 2005.57 The Texans based their claim on Mexico’s alleged violations of Articles 1102, 1105, and 1110 of NAFTA. The Texans asserted that they possessed the ‘fully adjudicated exclusive legal right to withdraw

1,227,596 acre-feet of water annually from the lower Rio Grande River.\textsuperscript{58} and alleged the following facts and arguments to support their claim that this right had been violated:

\begin{itemize}
\item From 1992 to 1997, Mexico delivered only 726,151 AF of water, 1,023,849 less than required under the 1944 Rivers Treaty. During the same period, the Texans alleged, nearly 4,350,000 AF of water were stored in twelve Mexican reservoirs to meet Mexico’s own demands; and, through October of 1999, another 5,900,000 AF of water were stored in the reservoirs.\textsuperscript{59}
\item From 1997 to 2000, Mexico delivered only 407,088 AF of water to the United States and by October 2002, Mexico’s total deficit was 1,476,181 AF.\textsuperscript{60}
\item From 1992 to 2002, Mexico captured and diverted, for use by Mexican farmers, ‘an investment (approximately 1,013,056 acre-feet of irrigation water) located in Mexico and owned by Claimants’.\textsuperscript{61} By diverting this water to Mexican farmers, Mexico increased its agricultural production and harmed the Claimants’ agricultural production.\textsuperscript{62}
\item By diverting the water that belonged to them, the Texans alleged that Mexico had thereby nationalized or expropriated, or taken a measure tantamount to nationalization or expropriation, of the ‘Texans’ investment, without compensation and due process, in violation of Article 1110 of NAFTA. (Article 1110 claim).\textsuperscript{63}
\end{itemize}

Based on these allegations, the Texans contended that Mexico had adequate water to fulfil its water delivery obligations under the 1944 Rivers Treaty, but simply chose not to do so.

The thrust of the Texans’ Chapter 11 claim was the allegation that they were the legal owners of 1,219,521 AF of irrigation water that was wrongfully diverted by Mexico before it reached the main stem of the Rio Grande, ‘the expropriation and diversion of which has severely damaged the ability of Texans and the farmers they represent to produce crops’.\textsuperscript{64} The Texans characterized their ‘investment’ under article 1139(g) of NAFTA as follows:\textsuperscript{65}

\textsuperscript{58} Claimants Notice of Intent to Submit a Claim to Arbitration Under s. B, Ch. 11 of the North American Free Trade Agreement (27 Aug. 2004), at 1, online: [http://naftaclaims.com/Disputes/Mexico/Texas/TexasNoticeOfIntent.pdf]. \textsuperscript{59} Ibid.\textsuperscript{60} NOI, supra n. 58, at 7; Notice of Arbitration, supra n. 57, at 36.\textsuperscript{61} NOI, supra n. 58, at 3.\textsuperscript{62} Ibid.; Notice of Arbitration, supra n. 57, at 32–33.\textsuperscript{63} NOI, supra n. 58, at 4.\textsuperscript{64} Notice of Arbitration, supra n. 57, at 36; In NOI, Claimants alleged they were the owners of 1,013,056 AF of water (NOI, supra n. 58, at 7).\textsuperscript{65} Notice of Arbitration, supra n. 57, at 27.
Rights to water located in Mexico; facilities to store and distribute this water for irrigation and domestic consumption; irrigated fields and farms; farm buildings and machinery; and ongoing irrigated agricultural businesses. Claimants have invested millions of dollars in an integrated water delivery system, including pumps, aqueducts, canals, another other facilities for the storage and conveyance of their water to the land on which it is used… Each Claimant’s Investment is entirely predicated on this right to receive water located in Mexican tributaries.66

The Texans alleged that between 1992 and 2002, ‘nearly $1 billion ha[d] been lost in decreased business activity and that 30,000 jobs ha[d] been precluded’.67 The value of the irrigation water at issue was estimated to be worth United States Dollar (USD) 350 to USD 730 per AF.68 Allowing for evaporation, diversion losses, and transportation losses of 25%, the total alleged loss for depriving the Texans of 914,641 acre feet AF of water (1,219,521 AF minus 25% equals 914,641) was estimated at between USD 320,124,350 and USD 667,687,930.69 As relief, the Texans sought compensation for either the expropriated water (between USD 320,124,350 and USD 667,687,930), or the economic losses caused by Mexico’s less-favourable treatment of the Texans’ investments (USD 667,687,930), including interest from October 2002, and costs.70

In its briefing to the NAFTA tribunal on the question of their ‘interest’ in the water in question, the Texans advanced the following argument based on the notion of an ‘integrated investment’:

Claimants are the legal owners of 1, 219,521 acre-feet of irrigation water wrongfully withheld and diverted from the Rio Grande by Mexico’s manipulation of its dams and reservoirs as of October 2002. These water rights, as well as delivery facilities, irrigation works, farms, equipment, and irrigated farming businesses of which they are an essential element, form an integrated investment, the expropriation and diversion of which has severely damaged the ability of Claimants to produced crops. (italics added.)71

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66. Notice of Arbitration, supra n. 57, at 27.
67. NOI, supra n. 58, at 7.
69. Notice of Arbitration, supra n. 57, at 39; Given that Claimants originally alleged they were the owners of 1,013,056 AF of water, they alleged damages between USD 265,927,200 and USD 554,648,150. NOI, supra n. 58, at 8.
71. Counter-Memorial of Bayview Irrigation District et al. in Support of Jurisdiction, Between Bayview Irrigation District et al. v. United Mexican States, ICSID Case No. ARB (AF)/05/1 (2006), at 7–8, online: <www.economia.gob.mx/work/snci/negociaciones/Controversias/Casos_Mexico/Marzulla/documentos_basicos/claim_mem_ing.pdf>. [Bayview Counter-Memorial] [emphasis added].
On the question of the applicability of the 1993 NAFTA Statement on Water, the Texans maintained:

Since Claimant’s water, which flows within courses of the six above-named Mexican tributaries before reaching the Rio Grande, where it is stored in Falcon and Amistad reservoirs, sold on the Water Marker and delivered through a complex or irrigation works, is clearly a good or produce in commerce, it necessarily falls within the scope of NAFTA.\(^72\)

On the question of whether the IBWC had exclusive jurisdiction over the matter pursuant to the dispute resolution provisions of the 1944 Rivers Treaty, to the exclusion of the NAFTA Chapter 11 tribunal, the Texans argued:

The fact that Mexico may have breached a treaty obligation [under the 1944 Rivers Treaty] owed to the United States does not immunize it from the separate consequences of a violation of Chapter 11 of NAFTA. Simply put, this arbitration is about... expropriation and compensation, resulting from Mexico’s seizure of water owned by Claimants. As investors, Claimants have the right to pursue this claim for respondent’s adoption of measures relating to their investment, and this tribunal has jurisdiction over this claim.\(^73\)

Although apparently disavowing that their NAFTA Chapter 11 claim was grounded on allegations of Mexico’s non-compliance with the terms of the 1944 Rivers Treaty, the Texans went on, somewhat confusingly, to contend that:

Following the conclusion of the [1944] Treaty, each nation owned the water resources allotted to it, and relinquished ownership of the water allotted to the other nation.\(^74\)

The 1944 Treaty was... more than a promise to deliver water. The 1944 Treaty consisted of an actual fixing of water rights in the Rio Grande and its tributaries, much like the fixing of the territorial boundary between the two nations.\(^75\)

The Texans therefore sought to base their acquired ‘interest’ in cross-border Rio Grande waters on the allocation regime set forth in the 1944 Rivers Treaty, while simultaneously arguing that they should not be limited by the dispute resolution mechanisms provided for in the 1944 Rivers Treaty.

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\(^72\) Ibid., at 25.
\(^73\) Ibid., at 44.
\(^75\) Ibid.
2.4. Government of Mexico’s Response to Texans’ Claims

In its briefing to the NAFTA Tribunal in response to the Texans’ claims, Mexico contended that there was no ‘investment’ as defined under Chapter 11. This was because all of the Texans’ lands and facilities were geographically located in Texas rather than in Mexico:

None of the claimants even argue that they have a property right in Mexico, whether in land, water or any other assets. [Mexico’s] Secretariat of Economy requested that they present a copy of the property title or other document that proves each one has a direct or indirect ownership or control of the investment allegedly affected. None of the claimants did so. 76

None of the systems, facilities and infrastructure that they allege to own is located in Mexican territory; all are located in the United States. 77

At a more basic level, if the claimants are located in the United States and are subject to US jurisdiction, specifically, to that of the State of Texas, it is perplexing at best to wonder how they can simultaneously be subject to Mexican jurisdiction . . . or how it is that Mexico could have expropriated a property right created by a foreign legal system and existing only in another country. 78

Regarding the application of the 1993 NAFTA Statement on Water to the Texans’ claim to water entitlements, Mexico disputed the contention that water in tributaries to the Rio Grande (or reservoirs on such tributaries) should be considered a good or product in commerce, explaining that water in its natural state cannot become a good or product until it is ‘taken out of its natural source, for example, to be bottled or stored in bulk or other types of containers’. 79

Mexico asserted the following in regard to the relevance of the dispute resolution mechanisms provided under the 1944 Rivers Treaty:

The claim is outside the scope of NAFTA by reason of the nature of the treaty: The breaches of NAFTA alleged by the claimants are based exclusively on the argument that Mexico breached obligation established in the Treaty Between the United States of America and Mexico Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande entered into by Mexico and the United States in 1944. 80

77. Ibid., at 30.
78. Ibid., at 34.
79. June 2007 ICSID Award, supra n. 74, at 13.
80. Mexico Memorial, supra n. 76, at 2.
The Bilateral Water Treaty has its own dispute resolution mechanism, which can only be invoked by Mexico and the United States.\(^{81}\)

The Water Treaty of 1944 grants the International Boundary and Water Commission (IBWC) exclusive jurisdiction.\(^{82}\)

Mexico stopped short of specifically alleging that the 1944 Rivers Treaty deprived the NAFTA Chapter 11 tribunal of proper jurisdiction over the Texans’ Rio Grande water claim, but its argument concerning the ‘exclusive jurisdiction’ of the IBWC seemed to point to such a finding.

### 2.5. June 2007 Tribunal Decision

On June 19, 2007, the ICSID NAFTA Chapter 11 Tribunal issued its decision on the Texans’ water claim against Mexico.\(^{83}\) The majority of the Tribunal’s decision was devoted to assessing the Texans’ ‘integrated investment’ theory, which could serve as the proper basis for jurisdiction over the claim. As the excerpt below indicates, the Tribunal had conceptual difficulty with the premise of this theory:

> The Tribunal considers that in order to be an ‘investor’ within the meaning of NAFTA Article 1101 (a), an enterprise must make an investment in another NAFTA state, and not its own... The simple fact that an enterprise in one NAFTA state is affected by measures taken in another NAFTA State is not sufficient to establish the right of that enterprises to protection under NAFTA Chapter Eleven: it is the relationship, the legally significant connection, with the State taking measures that establishes the right to protection, not the bare fact that the enterprise is affected by the measures.\(^{84}\)

> In the opinion of the Tribunal, it is quite plain that NAFTA Chapter Eleven was not intended to provide substantive protection or rights of action to investors whose investments are wholly confined to their own national States, in circumstances where those investment may be affected by another NAFTA State Part. The NAFTA should not be interpreted so as to bring about this unintended result. (italics added.)\(^{85}\)

> It is clear that the words ‘territory of the Party’ [in Article 1101(b) of NAFTA] do not refer to the territory of the Party of whom the investors are nationals. It requires investment in the territory of another NAFTA Party – the Party that adopted or maintained the measures challenges. In short, in order to be an ‘investor’ under Article 1139 one must make an investment in the territory of another NAFTA state, not in one’s own.\(^{86}\)

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81. Ibid.
82. Ibid., at 37.
83. June 2007 ICSID Award, supra n. 74, at 23.
84. Ibid., at 23 (para. 101) [emphasis added].
85. Ibid., at 23 (para. 103) [emphasis added].
86. Ibid., at 24 (para. 105).
In considering whether the Texans’ had or have an investment ‘in the territory’ of Mexico, and how this related to jurisdiction under NAFTA Chapter 11, the Tribunal determined:

In our view it is clear they do not. They have substantial investments in Texas, in the form of their businesses and, in the context of these proceedings, more particularly in the form of the infrastructure for the distribution of the water that they extract from the [Rio Grande]. They have investments in the form of the water rights guaranteed by the State of Texas. They are certainly ‘investors’; but their investments are in Texas, and they are not investors in Mexico or vis-à-vis Mexico.87

In the view of the Tribunal it has not been demonstrated that any of the Claimants seeks to make, is making or has made an investment in Mexico. That being the case, the Tribunal does not have the jurisdiction to hear any of these claims against Mexico because the Claimants have not demonstrated that their claims fall within the scope and coverage of NAFTA Chapter Eleven, as defined by NAFTA Article 1101. (italics in original.)88

The Tribunal’s disposition of the Texans’ Rio Grande claim therefore rested on the grounds that it lacked proper jurisdiction over the claim due to its determination that an investment in Mexico was not involved. Because it based its decision on these grounds, the Tribunal did not need to resolve the scope or limitations of the 1993 NAFTA Statement on Water, thereby avoiding having to reconcile potentially conflicting provisions of 1944 Rivers Treaty and NAFTA Chapter 11. On this latter question, however, the Tribunal did offer the following analysis that suggests that the 1944 Rivers Treaty might have provided an additional jurisdictional basis to deny the Texans’ claim:

The Claimants sought, with arguments of considerable subtlety and ingenuity, to identify a supervening right that overcame all such problems, by saying that in the 1944 Treaty Mexico alienated or relinquished title to one-third of the waters in [the Rio Grande’s tributaries in Mexico], just as States sometimes relinquish land territory treaties. According to this view, approximately one third of the water in [the Rio Grande’s tributaries in Mexico] belongs to the United States – although who owns what cannot be accurately determined at any given moment because of the sharing formula under Article 4 of the 1944 Treaty applies a combination of fixed amounts and percentage shares over periods of several years.89

The Tribunal can find no evidence in the 1944 Treaty to suggest that this imaginative interpretation of the Treaty, whose legal coherence and practical operability are open to considerable doubt, was intended by the Parties.

87. Mexico Memorial, supra n. 76, at 25 (para. 113).
88. Ibid., at 27 (para. 122) [italics in original].
89. Ibid., at 26 (para. 119).
The ordinary reading of the Treaty is that it is in agreement to apportion such waters as arrive in the international watercourse. If such a diversion [by Mexico of tributaries to the Rio Grande] were to occur, it may or may not amount to a breach of the 1944 Treaty. That would be a matter for the two States, who are the only parties to that Treaty. If the interest of US nations were thought to be prejudiced by any action alleged to amount to a violation of the Treaty, that is an issue which could be taken up by the US Government under the dispute resolution procedures in the 1944 Treaty. But the 1944 Treaty does not create property rights amounting to investments within the meaning of NAFTA which US national themselves may protect by action under NAFTA Chapter Eleven. The Tribunal expresses no views on the interpretation or application of the 1944 Treaty in the circumstances of this case. (italics added.)

The passage quoted above suggest that the Tribunal was of the general opinion that private non-State parties (such as the Texans) did not have standing to enforce rights granted to Mexico and the United States under the 1944 Rivers Treaty, and that even such State-to-State claims would likely be governed by the dispute resolution mechanisms set forth in the 1944 Rivers Treaty. However, this passage concludes with the comment that the Tribunal ‘expresses no view on the interpretation or application of the 1944 Treaty in the circumstances of this case’, leaving readers to sort out the legal significance of the Tribunal’s observations regarding the scope and exclusivity of the 1944 Rivers Treaty.

3. PRINCIPLES FOR RECONCILING POTENTIALLY CONFLICTING INTERNATIONAL TREATIES

The July 2007 Tribunal decision in the Rio Grande case touched on the relationship between the 1944 Rivers Treaty and NAFTA Chapter 11, although its analysis of this relationship was not explicitly relied upon in supporting its findings. It is therefore unclear what guidance the Tribunal’s decision may provide future disputes involving the interplay of cross-border water law and foreign investment law. The Tribunal’s decision offers some passages that would appear to lend support to a somewhat expansive view of the scope of cross-border water treaties, and a somewhat restrictive view of the application of foreign investment treaties to cross-border water resources, but it is likely that competing parties in future water-investment disputes may need to look to other sources of public international law.

One such alternative source that may be looked to would be international law principles for reconciling potentially conflicting international treaties.

90. Ibid., at 26 (para. 120).
91. Ibid., at 26–27 (para. 121) [emphasis added].

Cross-Border Water Law and Foreign Investment Law
Article 30(3) of the 1969 Vienna Convention on the Law of Treaties (Vienna Convention, which entered into force in 1980), entitled ‘Application of successive treaties to the same subject matter’, provides in pertinent part: ‘When all the parties to the earlier treaty are parties to the later treaty but the earlier treaty is not suspended or terminated . . . the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty’. In the case of Mexico and the United States with the 1944 Rivers Treaty and the 1994 NAFTA, and as was also the case with Ethiopia and Sudan and the 1959 Nile Agreement and the 2000 Ethiopia–Sudan Investment Treaty, and with Ecuador and Peru and the 1998 Zarumilla Agreement and the 1999 Ecuador–Peru Investment Treaty, it is often the pattern that the pertinent foreign investment treaty was negotiated after the pertinent cross-border water treaty. Provided that the two treaties are considered to be on the ‘same subject matter’ – a point that could well be contested – Article 30(3) of the Vienna Convention might lend support to the position that the provisions of the more recent foreign investment Treaty should take precedence over those of an earlier cross-border water treaty.

Article 31(2)(a) of the Vienna Convention provides that ‘The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text . . . any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty’. The 1993 NAFTA Statement on Water, which explained that ‘International rights and obligations respecting water in its natural state are contained in separate treaties and agreements negotiated for that purpose’, might be an example of the type of agreement noted in Article 31(2)(a). Such agreements can therefore potentially serve as a means for nations to reconcile the relationship between cross-border water treaties and foreign investment treaties – and, it is to be hoped, with greater clarity than the particular language employed in the 1993 NAFTA Statement on Water, which arguably complicated rather than clarified the application of NAFTA Chapter 11 to water.

Finally, another rule of treaty interpretation under customary international law, lex specialis, holds that a more specific treaty or treaty provision should prevail over a more general treaty or treaty provisions. In the case of the North American Rio Grande case, it might be argued that since the 1944 Rivers Treaty relates specifically to the question of the cross-border water allocations between Mexico and the United States, and given that NAFTA Chapter 11 relates to the more general question of appropriation of foreign investment, lex specialis would suggest (as the July 2007 Tribunal decision appeared to hint) that the dispute

93. Supra n. 6.
94. Supra n. 9.
95. Vienna Convention, supra n. 92, Art. 31(2)(a).
resolution provisions of the 1944 Rivers Treaty should prevail over the dispute resolution provisions of NAFTA Chapter 11 when allocation of the Rio Grande is at issue. The same application of *lex specialis* would also potentially apply in the Ethiopia–Sudan situation and the Ecuador–Peru situation, suggesting that the terms of the pertinent cross-border water treaties rather than the pertinent foreign investment treaties should control in the context of allegations involving the allocation of cross-border freshwater resources.

4. CONCLUSION

The recent NAFTA claim over the allocation of the Rio Grande provides a live example of the confluence of cross-border water law and foreign investment law. In the *Rio Grande* case, the Tribunal’s resolution hinged on its rejection of both the ‘integrated investment’ argument put forth by the Texans and their contention that they held a legal property interest in the disputed water because they were ‘adversely affected’ when such water was not delivered. The Rio Grande Tribunal’s rejection of these positions led it to determine that the Texans did not possess investments in Mexico – a determination that deprived the Tribunal of jurisdiction to further consider the claim.

The Rio Grande Tribunal also offered some intriguing comments as to the relation between the protection NAFTA offers to foreign investors and the 1944 Rivers Treaty, but there remains room for divergent interpretations as to the legal significance of this commentary – both in the context of the *Rio Grande* case, and as a precedent for future disputes. These are among the questions left to work through for Africa, South America, and other regions facing potential conflicts between cross-border water treaties and foreign investment treaties.